(a) *Ban Seng Leong*

Land – 6,336 sq ft ($35 psf)		$221,760.00
Buildings etc		41,618.00
Estimated capital value		$263,378.00
Annual value at 7%		18,436.46
	say	$18,500.00

(b) *Eastern Auto Centre*

Land – 11,116 sq ft ($35 psf)		$389,060.00
Buildings etc		107,976.00
Estimated capital value		497,036.00
Annual value at 7%		34,792.52
	say	$34,800.00

(c) Costs.

Order accordingly.

Solicitors: *Shearn Delamore & Co*; *Yacob & Rakan-Rakan.*

Reported by *Al-Mansor Adabi*

Classic Video Distribution Sdn Bhd v Asia Television Ltd

HIGH COURT (IPOH) – CIVIL SUIT NO 22-232-87
ABDUL MALEK J
17 MARCH AND 7 APRIL 1988

Civil Procedure – Injunction – Application by defendant for writ of summons to be struck off – Application for interim injunction to be set aside – Defendant out of jurisdiction – Security for costs – Agreement giving exclusive licence to produce, manufacture and distribute video programmes – Agreement terminated – Leave granted to serve outside jurisdiction and not to issue writ out of jurisdiction – Delay in service of injunction

In this case the plaintiff applied for an injunction to restrain the defendant from terminating the agreements which had given the plaintiff exclusive licence to produce, manufacture and distribute video programmes belonging to the defendant. The plaintiff also applied for leave to serve the order of the interim injunction and the notice of the writ of summons on the defendant in Hong Kong. The defendant applied to strike off the writ of summons and to set aside the order for the issuance and service of the writ of summons and also to set aside the interim injunction. It appeared that there had been a delay in the service of the interim injunction on the defendant. In reply to the application of the defendant, the plaintiff applied for an order that the purported termination of the agreements be declared null and void and that the agreements still subsist.

Held, dismissing the application:

(1) As the defendant was outside the jurisdiction, it should pay $10,000 as security for costs.

(2) As no leave had been obtained to issue the writ out of jurisdiction, the leave to serve the notice of writ would be rendered meaningless.

(3) In the circumstances an order in terms of the defendant's application would be granted and the senior assistant registrar be ordered to fix a date for the assessment of damages, if any, occasioned by the defendant as regards the grant of the interim injunction.

Cases referred to

1 *Aeronave SPA & Anor* v *Westland Charters Ltd & Ors* [1971] 3 All ER 531 (folld)
2 *New Malaya Co Ltd* v *Abu Bakar* [1961] MLJ 151 (folld)
3 *The Beauty Orchid II; Pacific Corporation Traders* v *Beauty Orchid II Owners & Ors* [1977] 2 MLJ 83 (refd)
4 *M'Neil* v *Garratt* 41 ER 427 (refd)

Legislation referred to

Rules of the High Court 1980 O 6 r 6, O 11, O 18 r 1

Leonard Peters for the plaintiff.
SF Wong for the defendant.

Cur Adv Vult

Abdul Malek J: On 7 March 1988 the defendant had filed a summons-in-chambers (encl 11) applying for the following orders:

(1) an order that the issuance and service of the generally endorsed writ of summons and service of the order of court dated 15 December 1987 be set aside;
(2) an order that the generally endorsed writ of summons dated 15 December 1987 be struck off under O 18 r 19 of the High Court Rules 1980 or under the inherent jurisdiction of this honourable court;
(3) in the event prayers (1) and/or (2) be granted a further order that judgment be entered for the defendant against the plaintiff and the plaintiff be ordered to pay the defendant the costs incurred in relation to this suit;
(4) an order that the interim injunction granted vide order of court dated 15 December 1987 be unconditionally set aside and a date be fixed for the assessment of damages suffered by the defendant pursuant to the plaintiff's undertaking given to this honourable court for the grant of the said order;
(5) an order that the costs occasioned by this application be provided for; and
(6) any further or other reliefs this honourable court deems fit.

Upon a certificate of urgency, the hearing was fixed on 17 March 1988. One day earlier, on 16 March 1988, the plaintiff filed a summons-in-chambers (encl 16) praying for the following orders:

(a) that the purported termination of the agreements dated 28 October 1987 by a letter dated 26 February 1988 from the defendant's solicitors to the plaintiff be declared null and void;

(b) that the court do declare that the said agreements still submit (should have been 'subsist') legally between the plaintiff and the defendant and that the status quo of the parties herein remains unaffected and exists as under the said agreements;
(c) for costs; and
(d) such further and/or other relief that this honourable court deems fit.

Despite the eleventh hour filing of the plaintiff's application, both counsel agreed that both the applications should be heard together. At the outset, however, learned counsel for the plaintiff raised a preliminary objection as regards security for costs in view of the fact that the defendant was based in Hong Kong and was therefore out of the jurisdiction.

Learned counsel for the defendant did not put up a strong resistance but although he agreed it was entirely within the court's discretion to grant security for costs, he said that the plaintiff presently owed the defendant $6.8 million as arrears of licence fees, that the defendant was not engaged in small business but in a video enterprise on a big scale and in any case the defendant had a good chance of succeeding in his application.

Having considered the arguments on this point and based on *Aeronave SPA & Anor* v *Westland Charters Ltd & Ors*[1] and *New Malaya Co Ltd* v *Abu Bakar*,[2] I ordered that the defendant pay $10,000 as security for costs to be paid by the following day to avoid a postponement of the hearing, as both counsel had come from Kuala Lumpur, in view of the fact that learned counsel for the plaintiff had objected to the hearing going on without the security being furnished beforehand.

It is necessary at this stage to refer to the plaintiff's earlier ex parte summons-in-chambers (encl 4) also on a certificate of urgency where the plaintiff had asked for the following orders:

(a) that the defendant by itself, servants, or agents or otherwise however be restrained and that an injunction be granted restraining the defendant from terminating the agreements dated 28 October 1987 made between the plaintiff of the one part and the defendants of the other part;
(b) that the defendant by the same injunction be restrained from signing any fresh agreements with any new licensee/agent, and/or directly with the dealers in Malaysia and Brunei granting them the exclusive rights already granted to the plaintiff by virtue of the said agreement dated 28 October 1987;
(c) that the defendant by the same injunction be restrained from releasing any new video tapes to dealers and/or agents directly in Malaysia and Brunei;
(d) that leave be granted to the plaintiff to serve the order of the interim injunction and the notice of the writ of summons on the defendant out of jurisdiction at No 81, Broadcast Drive, Hong Kong or elsewhere in Hong Kong;
(e) for directions as regards the mode of service on the defendant;
(f) for costs; and
(g) further and/or other relief that this honourable court deems fit.

As regards encl 11, Mr Wong Sai Fong for the defendant referred to the plaintiff's affidavit at encl 3 para 2 which had referred to the agreement (FY1) dated 1 October 1984 between the defendant and Classic Video Programme Sdn Bhd ('the CVP agreement') where the former had granted to CVP an exclusive licence to produce, manufacture and distribute video programmes on the defendant's behalf within Malaysia and Brunei. Mr Wong commented that the contract number VC/M1/29/038C does not appear on the top left hand corner of FY1 as it does on FY2 (VC/M1/29/160C).

According to Mr Wong, stating in that paragraph that the CVP agreement was terminated on 28 October 1987 was a misrepresentation as that was not true. Paragraph 3 of the same affidavit was again a misrepresentation according to Mr Wong as the plaintiff had stated that FY1 was followed by FY2, a similar agreement between the defendant and the plaintiff (the CVD agreement) whereas in para 4 the plaintiff had admitted there were in fact two other agreements on 15 December 1986 which they did not state in para 3 or exhibit as annexures.

Mr Wong conceded that HK$18 million had been paid by the plaintiff to the defendant under the CVP agreement as stated in paras 5, 6, and 7 of the affidavit. However, the defendant contended that the plaintiff still owed them money under the CVD agreement amounting to HK$6.8 million.

Learned counsel for the defendant further submitted that as regards the injunction order obtained by the plaintiff ex parte on 15 December 1987, it was served on the defendant by telefax only on 1 March 1988. Mr Wong argued that this ex parte application on a certificate of urgency was frivolous and an abuse of the process of the court considering the fact that the plaintiff served the said order on the defendant only 76 days later. In any case the CVD agreement had been terminated on 26 February 1988 (HC2 at encl 10) which was duly acknowledged by the plaintiff and published in the press.

The reason for the termination, according to Mr Wong, was that the plaintiff had breached cl 5A of the CVD agreement (FY2) and the termination for such breach was provided for in cl 12 of that agreement. Mr Wong went on to state that on the date of termination, the plaintiff had failed to pay the charges under B(b)-(c) of FY2. He also added that para 9 of the affidavit at encl

10 also states that the injunction binds the defendant from the date of the order provided the defendant had notice of the said order. Since the defendant had notice of the injunction only on 1 March 1988, he was of the view that the injunction was devoid of legal effect in restraining the defendant from terminating the said agreement.

Mr Wong also argued that leave was granted to serve under O 11 of the Rules of the High Court 1980 ('the Rules'), and not to issue the writ under O 6 r 6 of the Rules, out of the jurisdiction. Furthermore, he said that the writ at encl 1 was only a general indorsement of five lines which was only a remedy and not a cause of action. To get an injunction, Mr Wong argued, a cause of action must be shown.

Learned counsel for the plaintiff Mr Leonard Peters referred to the affidavit at encl 13 in support of the plaintiff's application at encl 16 where para 13 thereof explained why there had been a delay in service and notification of the injunction to the defendant. The reason was that the parties had been negotiating after the injunction was obtained. Counsel added that when the deponent left for the United States in February, the defendant purportedly terminated the agreement.

Mr Peters argued that the termination was defective as it was notified to the plaintiff on the very day the termination took place on 26 February 1988. As a result, the plaintiff immediately served the injunction by fax on 1 March 1988 and by courier on 3 March 1988.

As regards the service of the writ out of the jurisdiction, counsel submitted that leave to issue the writ must have been granted although a formal application was not made in view of the leave obtained to serve the order out of the jurisdiction at encl 6. On all the other points raised by Mr Wong, Mr Peters said that they were triable issues which needed to be determined at a full trial. He also stated that the plaintiff never intended to conceal any facts, in particular, as regards the two agreements in between the CVP and CVD agreements.

Concerning the cause of action, Mr Peters argued that the plaintiff would file a statement of claim 14 days after the defendant entered their conditional appearance on 7 March 1988 as provided for by O 18 r 1 and O 6 r 2 of the Rules. In consequence, Mr Peters submitted that the injunction should not be dissolved until the matter had been disposed of completely.

In reply, Mr Wong again referred to cll 5A and 12 of the agreement FY2. He also reiterated that leave to serve does not amount to leave to issue. Mr Wong further submitted that in the plaintiff's affidavits, there had been no reply to questions of fact at all.

It is relevant to reproduce cll 5A and 12(a) of the agreement FY2:

> 5A The licensee shall pay the licensor the fees specified in Schedule 5 hereto in the manner as specified in the said Schedule provided always that the failure to make any of the payments on the part of the licensee as aforesaid shall be deemed a fundamental breach of this agreement and provided further that all the said payments shall be free and clear and without any deduction or charges of any nature now or hereafter imposed by the government or other appropriate authority/authorities of the territory and provided further that acceptance of the fees or any part thereof by the licensor shall not be deemed to operate as a waiver by the licensor of any right to proceed against the licensee in respect of any breach, non-observance or non-performance of the undertakings, terms and conditions herein contained and on the licensee's part to be observed and performed or obligations on its part assumed herein any rule of law or equity to the contrary notwithstanding and in particular but without prejudice to the generality of the foregoing acceptance of late payment of the fees or any part thereof shall not be deemed to operate as a waiver by the licensor of any right to proceed against the licensee in respect of such late payment and provided further such acceptance aforesaid shall not in any way prejudice or affect the undertakings, terms and conditions herein contained or the continuing liability (if any) of the licensee to make further payment of the fees or any part thereof or otherwise.
>
> 12 This agreement shall be terminable by the licensor forthwith in the event:
>
> (a) that the licensee fails to pay to the licensor (whether the same has been demanded by the licensor or not) any part of the fees and charges provided for under cl 5A hereof when the same fall due.

It is also pertinent to refer to cll 13 and 19 of that same agreement which read as follows:

> 13 In the event that the licensor shall terminate this agreement by reasons aforesaid the licensor shall be entitled without prejudice to its right to make any other claim:
>
> (a) to forfeit all paid amounts of the fees; and
> (b) to recover as liquidated damages from the licensee the unpaid amounts of the fees and all damages and legal costs incurred by the licensor therefor.
>
> 19 Time is of the essence of this agreement, but no failure or delay on the part of the licensor to exercise any right, power or remedy under this agreement shall operate as a waiver thereof, nor shall any single or partial exercise by the licensor of any other right, power or remedy hereunder preclude any other or further exercise thereof or the exercise of any other right, power or remedy. The rights, powers and remedies provided herein are cumulative and are not exclusive of any rights, powers or remedies provided by law.

We are, to my mind, only concerned with this agreement as the earlier agreement FY1 entered into on 1 October 1984 was to run only for three years from 15 September 1984 according to cl 1(a). From the clauses of FY2 reproduced above, it is clear that the defendant had the right to terminate the agreement if there had been a fundamental breach by the plaintiff. In this case the payments due on the dates specified in Schedule 5, in particular for items B(b) and (c) (HK$2,666,667 on or before 15 September 1987 and HK$2,666,667 on or be-

fore 15 December 1987) had fallen due and this amounted to a fundamental breach. On this point, I hold that the agreement is clear that no notice need to be given to the other party and the plaintiff's objections of the lack of such notice is therefore devoid of merit.

Now, was the plaintiff really caught unaware by this termination? If we were to peruse the affidavit of Francis Yap Chee Keong, the General Manager of the plaintiff, affirmed in support of the application for the injunction granted on 15 December 1987 he was aware of this possibility and was in fact trying to prevent it from happening. Of course he also averred that there had been some confusion in the accounting as between the two agreements FY1 and FY2 but the main issue then was that he was trying to prevent the termination of FY2 taking place. This in fact resulted in the plaintiff's ex parte injunction at encl 4.

Apart from being ex parte, it was also brought on a certificate of urgency. Now then, why did the plaintiff wait for 76 days before serving the injunction on the defendant? In Francis Yap's affidavit at encl 13 in reply to the defendant's application and affidavit at encl 11, he explained in para 13 that the delay was due to ongoing negotiations between the parties. Yet he said when he left for the United States in late February that the defendant saw it fit to terminate the relevant agreement.

I was of the view that the plaintiff was well aware that the defendant was going to terminate and that was why the plaintiff applied ex parte for the injunction on a certificate of urgency. He should have in those circumstances served the injunction before holding the negotiations instead of holding on to the injunction order, as learned counsel for the defendant puts it, as a 'weapon' in case the negotiations failed. Without the injunction order served on them, it was well within the rights of the defendant to terminate the agreement and it is purely the plaintiff's fault if they did not serve it earlier despite having obtained it some 76 days before the service.

This strategy by the plaintiff, especially when they were owing money to the defendant at the time of making the application, was clearly an abuse of the process of the court.

The writ was also, as learned counsel for the defendant submitted, in the form of a general indorsement. In the *Beauty Orchid* case,[3] the writ was set aside as it was held that having only a writ of summons and its indorsement to look at with no statement of claim although the Rules require a statement of claim to be filed was not sufficient as the court was in no position to say that the plaintiff had a cause of action.

It has also been held in *M'neil* v *Garratt*[4] that a party who has notice of an order of court is bound by it from the time it is pronounced and in the case of an injunction, he may be committed for contempt without the production of the writ of injunction and although the writ had not been issued. In this case, the defendant was based in Hong Kong and considering the plaintiff's explanation that the failure of the negotiations between the parties and the termination of the relevant agreement by the defendant had resulted in the service of the injunction, it is improbable that the defendant had any notice of the grant of the order in the first place. If they did, their first action would be to terminate the agreement immediately as they could do so anyway and not wait more than two months after the event after further negotiations. I was of the view that the defendant only knew of the injunction when it was served on them.

As regards leave to issue the writ out of the jurisdiction, counsel for the defendant contends, and counsel for the plaintiff concedes, that no application had been made under O 6 r 6 of the Rules but the latter argues that this is understood following the application for leave to serve the notice of the writ out of the jurisdiction under O 11 r 1 of the Rules. I am of the view that these are two separate applications on reading the two relevant orders and hold that without the leave to issue the relevant writ, the leave to serve the notice of writ would be rendered meaningless.

In the circumstances, I granted an order in terms as regards all the prayers in the defendant's application at encl 11 and ordered that the senior assistant registrar fix a date for the assessment of damages, if any, occasioned by the defendant as regards the grant of the interim injunction on 15 December 1987. At the same time and consequential to that decision, I dismissed the plaintiff's application at encl 16 with costs.

Order accordingly.

Solicitors: *Leonard Peters & Co; Shearn Delamore & Co.*

Reported by *Prof Ahmad Ibrahim*